

88 - 1809

No. _____

Office - Supreme Court, U.S. FILED APR 5 1984 ALEXANDER L. STEVAS. <hr/> CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LINA F. RHODES,

Petitioner,

v.

RICHARD J. HOGAN, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

Lina F. Rhodes
(not an attorney)

May 1, 1984

QUESTION PRESENTED

Whether a suit for three wilful and malicious acts of libel is time-barred by Petitioner's failure to sue Respondent within one year after learning:

a. On 12 August 1966, that Respondent had taken unspecified steps to have Petitioner medically retired, which steps Petitioner assumed to be the filing of the written complaint referenced in b;

b. In August 1966, of the existence, though not the libelous content of, a written complaint about Petitioner, by Respondent, to the Navy; or

c. On 4 August 1979, (through a reference contained in a VA doc-

ument) that Respondent had made false statements by telephone to the VA on 24 March 1966;

in consideration of the facts that:

- (1) The Petitioner knew of the existence of no other related communications from Respondent to Federal Agencies until 31 October 1980, after which she did file an action within one year; and
- (2) None of the incidents, a., b., or c., clearly indicated to Petitioner that the Respondent had had malicious intent, since the Respondent had often demonstrated what the Petitioner perceived to be incompetence, rather than malice, in matters requiring intelligent judgment. Consequently, a review

of Petitioner's reasons for filing an action against the VA, the Navy, the Civil Service Commission, and/or Office of Personnel Management, within one year after the occurrence of incident c., shows that malicious intent of the Respondent was not among said reasons; and, therefore, contrary to the ruling of the Sixth Circuit Court of Appeals, the existence of such an action is not sufficient proof that Petitioner knew, at that time, or reasonably should have known, that a cause of action existed against the Respondent.

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TABLE OF AUTHORITIES

None. (Petitioner feels that the case is unique and that the circumstances may be unprecedented).

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LINA F. RHODES, Petitioner

V.

RICHARD J. HOGAN, JR., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH
CIRCUIT

The petitioner, Mrs. Rhodes, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on February 10, 1984.

JURISDICTION

Petitioner is a resident of Memphis, Tennessee, and Respondent is a resident of Palm Springs, California.

The Court of Appeals for the Sixth Circuit, by order dated December 12, 1983, affirmed the District Court action dismissing Petitioner's complaint concerning three libelous documents, with a ruling that the complaint was time-barred because Petitioner failed to file against Respondent, Captain Hogan, within one year after learning that he had slandered her by telephone to the VA. (Mrs. Rhodes gained access to the three libelous documents in 3-1-2 order, beginning on 31 October 1980, after which she did file a complaint against him within one year on 27 October 1981). Mrs. Rhodes filed a Petition for Rehearing on 22 December 1983. Final action denying her motion was by Order dated 10 February 1984.

This Court's jurisdiction is invoked under 28 U.S.C. § 2106.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution: Amendment

5: No person shall be ... deprived of life, liberty, or property, without due process of law

United States Constitution: Amendment

14: No state shall ... deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Mrs. Rhodes, was an Army veteran with a 30% service-connected disability for a nervous condition, and had been in her Navy employment as a legal secretary and court reporter for more than 15 years, with awards for sustained superior performance of duty for the past 7, when she was forced into involuntary medical retirement

on 12 December 1966 because of three sets of false statements maliciously made without her knowledge by Captain Hogan. He had been occupying the position of Staff Legal Officer, Naval Air Technical Training Command, for about nine months when he wrote the first of these libelous documents:

Letter of 25 March 1966 to the VA
(Exhibit 6-B);

Memorandum of 13 July 1966 to Navy
Industrial Relations Officer
(Exhibit 12);

"Superior Officer's Statement in Connection with Application for Total Disability Retirement, Civil Service Retirement System" in August 1966
(Exhibit 11).

Before Captain Hogan wrote any of the libelous documents listed above, he made another set of false statements to the VA by telephone on 24 March 1966. They were

summarized by a VA doctor and made a part of Mrs. Rhodes' record in 1966 as a VA outpatient. She learned of these telephone statements when she read a copy of her VA record on 4 August 1979.

The Court of Appeals has ruled that she knew or reasonably should have known on 4 August 1979 that she had a cause of action against Captain Hogan.

It is Mrs. Rhodes' contention that, having been denied access to any of the libelous documents until 31 October 1980, she had no way of knowing of the malicious intent of Captain Hogan.

Captain Hogan seemed to her, in 1966, to be a man of very poor judgment and capable of exaggeration. In 1966 she requested that the Navy and the Civil

Service Commission give her access to his written complaint about her (which she presumed to be dated on or about 12 August 1966), but she was denied access. She therefore had no proof that the complaint had been made with malice rather than with the misjudgment and exaggeration characteristic of him.

Upon seeing, on 4 August 1979, the biased and distorted records that had been produced by the VA in 1966, Mrs. Rhodes assumed that Captain Hogan's telephone remarks, referenced therein, had similarly stemmed from the above-mentioned flaws rather than malice.

What Captain Hogan said to the VA by telephone on 24 March 1966 was an unplanned response to a telephone call from the VA.

Captain Hogan had threatened to terminate Mrs. Rhodes' employment if she were to take any more time off in behalf of a sick child. She told the VA about it and asked for a tranquilizer. The VA's Dr. Chappell telephoned Captain Hogan, who defended what he had done by telling Dr. Chappell: (1) That the child was not sick, just "dreadfully spoiled;" (2) That Mrs. Rhodes let the child stay out of school without good reason and then had to miss work in order to take care of the child; and (3) That Mrs. Rhodes had not been efficient for months "and possibly years," none of which was true. To Mrs. Rhodes, upon reading this, it seemed to be a matter of someone of poor judgment making excuses for having behaved badly.

However, from the VA record Mrs.

Rhodes obtained in August 1979, she did find that the VA psychiatrist, Dr. Chappell, had borne malice in her case, in the form of an anti-female bias. He is quoted in the VA record as referring to the home in which Mrs. Rhodes, her sister, and their mother, were providing for themselves and three children, as a "menagerie of bitches." Mrs. Rhodes was extremely shocked to see that the VA had acted contrary to her best interests in 1966 by creating biased and distorted records, and had in general mismanaged her case. Further, without knowledge of Captain Hogan's letter to the VA dated 25 March 1966, Mrs. Rhodes thought that the VA had negligently taken its erroneous actions solely on the basis of the telephone conversation with Captain Hogan of 24 March 1966. In addition,

she was distressed that she had signed a Release of Information in September 1966, for the VA to provide information to the Civil Service Commission about her, without knowing of its damaging content. The tone of the record was especially surprising, because the VA psychologist, Dr. Cassius, had told her: "Don't worry. They can't retire you without checking with the VA, and the VA will say 'No.'" (Dr. Cassius did in fact make remarks in the VA records of August and September which were favorable to Mrs. Rhodes and unfavorable to Captain Hogan. However, the Civil Service Commission apparently overlooked them, or chose to disregard them).

Because of the malice demonstrated by the VA in its March and April 1966 records, the negligence of the VA in accepting as

true, without verification, the self-defensive false telephone statements of Captain Hogan; and the possibility that the Navy and the Civil Service Commission had processed a medical retirement for which there was no foundation; and the fact that the Office of Personnel Management would not provide her with a copy of Captain Hogan's August 1966 complaint against her; Mrs. Rhodes filed on 18 September 1979 an action against all the above agencies. (Rhodes vs Navy, VA, Civil Service/OPM, Supreme Court Case No. 81-6000; final action denying certiorari March 1982).

The complaint in the 1979 case mentions "evidence of collusion" which was quoted from a VA record. It should be pointed out that Mrs. Rhodes, in 1979,

thought this to be a reference to the fact that Emily Shelton, GS-4 Stenographer, in July 1966, received a civilian pay raise notice and marked it for routing to the three officers and back to herself for filing, omitting Mrs. Rhodes from the routing. Mrs. Shelton had, in addition, circled her own and Mrs. Rhodes' salaries on the document as if to point out to everyone some imagined injustice in the disparity between them. In the light of documents obtained by Mrs. Rhodes on and after 31 October 1980, it became known to Mrs. Rhodes that Dr. Cassius' reference to "evidence of collusion" came instead from his knowledge of actions committed by Captain Hogan, of which Mrs. Rhodes had no knowledge in 1979.

The pay raise notice which Mrs. Rhodes knew about is in the records of both the 1979 case and this case (Exhibit 9). The knowledge which Dr. Cassius had, and which Mrs. Rhodes did not have, is the fact that Captain Hogan had also written the VA a letter dated 25 March 1966 (Exhibit 6-B) which further deceived the VA and adversely affected her credibility.

In view of the foregoing, the 1979 action against the federal agencies was not based upon any perceived malice or libelous documents of Captain Hogan, contrary to the statement of the Sixth Circuit Court of Appeals in its action (Appendix A-2-3).

In the light of the libelous documents received by Mrs. Rhodes on and after 31 October 1980, the following is an account

of what actually happened:

On the day following the telephone statements of 24 March 1966, Captain Hogan wrote the VA a letter dated 25 March 1966 (Exhibit 6-B) which destroyed Mrs. Rhodes' credibility and kept the VA deceived for months.

The 25 March 1966 letter of Captain Hogan refers to a letter which Mrs. Rhodes wrote in July 1965 to a departing officer who had performed for months the duties of Acting Staff Legal Officer. At the time she wrote the letter, Captain Hogan had just reported in for duty as the replacement Staff Legal Officer (as shown by his reply to Question 2, Exhibit 11). Thus, when he told the VA that statements in Mrs. Rhodes' July 1965 letter were "without any foundation in fact," he was

referring to events for which he had not even been present. What Mrs. Rhodes said in the letter was true. Captain Hogan was straining a point in even referring to the departing officer as "formerly attached to my staff." In contrast to Captain Hogan's confidential criticism of Mrs. Rhodes to the VA, in March 1966, he publicly rated her outstanding six months after he learned, in July 1965, of the contents of her letter. (Exhibits 3 and 4).

By telephone on 24 March 1966, Captain Hogan falsely assured the VA that he was interested in protecting Mrs. Rhodes' rights as a civil service employee.

Dr. Chappell (apparently without even waiting for the results of tests given to Mrs. Rhodes by a VA psychologist, Dr. Cassius), wrote a hasty and premature

letter on 28 March 1966 (Exhibit 7) to Captain Hogan, thanking him for the "insight" and stating that it would be a "rather formidable therapeutic task" to straighten Mrs. Rhodes out but the VA certainly would do its best.

(The VA was completely deceived. Less than a month after Captain Hogan made the telephone remarks about Mrs. Rhodes' efficiency, performance ratings were again due, and he wrote -- for the Navy -- "Mrs. Rhodes continues to produce work of outstanding quality. She is most thorough and accurate." (Exhibit 5)).

Captain Hogan knew very well that the 28 March 1966 VA letter was invalid and had resulted from his own false statements to the VA, but he used it against Mrs. Rhodes without letting the Navy or the

Civil Service Commission know that it was invalid. He didn't do it right away. He waited until after the transfer of the Chief of Staff who would have recognized a complaint against Mrs. Rhodes as being false. The Chief of Staff served as President of the Armed Forces Disciplinary Control Board, of which Mrs. Rhodes was the Recorder. At the June 1966 meeting of the Board, the Chief of Staff announced that he was being transferred. (Exhibit 17, Item 3, at Page 2, Paragraph 2).

On 13 July 1966, after Mrs. Rhodes had performed excellently all her duties, and after the Chief of Staff had been transferred away, Captain Hogan wrote an outrageously false memorandum to the Navy Industrial Relations Officer in which he implied that Mrs. Rhodes had a serious

psychiatric disorder which prevented her from doing her work. As Enclosure (1), he sent along with it the 28 March 1966 VA letter, which only seemed to support what he was doing but actually did not. (Exhibits 12 and 7).

Among the many false statements made by Captain Hogan in the 13 July 1966 memo is one to the effect that he had been without Mrs. Rhodes' services for "many weeks." She had in fact taken only 5 hours of annual leave that month, 9 hours of annual leave the previous month, and no sick leave at all since 8 April 1966.

Mrs. Rhodes did not even know of the existence of the 13 July 1966 memo until 31 October 1980 and was not given access to it until 23 December 1981. Until she saw it, she did not know that there was in

fact no disqualifying medical evidence against her and that Captain Hogan had put over a hoax.

Mrs. Rhodes was given a full day of examinations at the Naval Air Station Dispensary on 22 August 1966. The Navy doctors did not find her disabled for her job. She did not know that, however, until 1980. The report of the Navy psychiatrist, Dr. Shaffer (Exhibit 8) seems to be little more than a recommendation that she be given whatever time off she might need for her VA appointments.

When the Navy doctors failed to disqualify Mrs. Rhodes for her job, Captain Hogan made up a whole new set of false statements for the next of his libelous documents, the "Superior Officer's Statement in Connection with Application for

Total Disability Retirement, Civil Service Retirement System" (Exhibit 11), presumably signed by him the last week of August 1966.

Exhibit 11 is a printed Form 2801-A, to be used with the Application itself, Form 2801, which carried a warning that any false statement made in connection with it could result in a fine of \$10,000 and five years in prison. Question 6 of Form 2801-A asked for information in regard to sick leave taken over the past two years -- and Captain Hogan had already falsely stated in the July document that he had been without her services for "many weeks." He got around this by giving his reply to Question 6 in a scrambled and deceiving fashion and by making some eye-catching false statements in reply to

Questions 4, 5, 7, and 8, which nobody could refute except Mrs. Rhodes, and she would not be permitted to see the document. (The Freedom of Information Act was not passed until the following month).

This is Question 6 and Captain Hogan's reply to it, withholding the fact that there had been no sick leave at all taken since 8 April 1966:

"6 Approximately how many days has the applicant been absent because of illness within the past 2 years."

Reply: During the period 1 Aug 64 to 1 Aug 66 the applicant has taken 203 hours sick leave, of which 120 were taken during the period 1 Jan 66 to 1 Aug 66. 203 hours being a total of 25.375 days."

To overcome the fact that the doctors had not disqualified Mrs. Rhodes for her job, and to overcome the fact that 25.3 days of sick leave over a period of two years

is less than a day and a half beyond the amount that could be extended to anyone at all (and an additional 30 days of sick leave could have been borrowed in advance under an honest and caring supervisor), Captain Hogan stated or implied elsewhere in the document:

In reply to Question 4: That Mrs. Rhodes was disabled for performance of "virtually all" her duties. (At or about the same time he was making that statement, he assigned Mrs. Rhodes as the sole reporter for three trials by special court-martial convened by the Naval Air Station. (Exhibit 17, Items 4, 5, and 6)).

In reply to Question 5: That "Mrs. Rhodes' emotional instability became particularly noticeable around November 1965." (This is inconsistent with the outstanding

performance letter of 24 January 1966 (Exhibit 3)). Further, he falsely claimed that domestic problems interfered with Mrs. Rhodes' work, and said that she had an "unteachable" child who made constant phone calls to the office. (Far from being unteachable, the child was at the top of her class; the child did not make constant phone calls; the workload was quite low in 1966, but whatever work was done by Mrs. Rhodes was done excellently (Exhibit 17)).

In reply to Question 7: Captain Hogan said that "reportedly" Mrs. Rhodes had a "World War II history of such problems." (If he was referring to inability to perform office duties because of a severe psychiatric problem, he was very much in error. Mrs. Rhodes was secretary

to the Mayor of Memphis when she enlisted in the Army in 1943. She excelled at and enjoyed her office work in the Army. She left the Army in 1945 with a superior efficiency rating).

In reply to Question 8: Captain Hogan falsely stated that "since undergoing psychiatric treatment, because of ingestion of prescribed drugs" Mrs. Rhodes had been "on many days and occasions torpid, languid and ... incapable of carrying out her duties." (That might truthfully be said in regard to one moment on one day, 28 July 1966, when Mrs. Rhodes had been injured in a traffic accident on 27 July 1966, and remained on duty with the use of a pain pill).

As proof that she continued to produce work of excellent quality, Mrs. Rhodes

has offered as Exhibit 17 (Joint Appendix Volume III of the papers submitted to the Court of Appeals) a copy of every court and board convened by the command from 1 December 1965 to 1 December 1966, showing her to have been the sole reporter or recorder, and showing her work to have been virtually flawless, right on down to the termination of her employment 12 December 1966.

Mrs. Rhodes did not file an appeal in regard to her medical retirement. Her doctors were federal personnel of the VA. She had signed a Release of Information and assumed that the VA tried to help but couldn't overcome the "medical evidence" which the Civil Service Commission said its decision was based on. She asked for access to Captain Hogan's complaint and to

pertinent medical records. Access was denied. (Exhibit 10).

On the personnel action terminating Mrs. Rhodes' employment, the reason is given as "Retirement based on employee's emotional instability." These are not the words of a doctor, but of Captain Hogan (Reply to Question 5, Exhibit 11).

It is Mrs. Rhodes' contention that each of the libelous documents presented a cause of action independently. Each was unlike the others. Each was written wilfully and maliciously and with full knowledge that it would be greatly to the detriment of Mrs. Rhodes. And each was unlike the slander-by-telephone both in content and provable intent.

There has been no trial. The action of the District Court was so one-sided and

erroneous, Mrs. Rhodes doubts that the learned Judge whose name appears on the orders had read the case. He was in the process of finishing up his District Court work to move to a higher position on the Sixth Circuit Court of Appeals, and may have relied too heavily on subordinates. There are at least two errors in the Court Order of 8 September 1982 which could be very misleading upon review:

- (1) There is a misquote (Appendix A-4-3, Paragraph 4) from one of the libelous documents (Exhibit 12) indicating that Captain Hogan was recommending "treatment." The word used by Captain Hogan was "retirement."
- (2) The Court states (Appendix A-4-11):

"She cannot now be heard to claim that she only recently discovered the cause of action because of her recently gained access to the actual documents which she previously had knowledge of."

The records in this case and in the related 1979 case show clearly that until 31 October 1980 Mrs. Rhodes did not even know of the existence of the first two libelous documents that were signed by Captain Hogan (Exhibit 6-B with which he destroyed her credibility with the VA; and Exhibit 12 with which he portrayed her to the Navy as having a severe psychiatric disorder preventing her from doing her work) — and the records show further that until 31 October 1980 she did not know of the contents of the third of the libelous documents, Exhibit 11, so had no way of knowing, or even suspecting, that it contained false statements that went far, far beyond the contents of the slander-by-telephone.

Captain Hogan seems to have been motivated by religious discrimination.

After he had removed Mrs. Rhodes from her GS-7 job by illegal means, he promoted to the secretarial portion of it the GS-4 stenographer, who was of the same religion as he, Catholic. For the court reporting duties, he brought in from outside civil service a man with whom he was previously acquainted and who was, Mrs. Rhodes is informed and believes, also a Catholic. (Mrs. Rhodes is not a Catholic, but would like to make it clear that she is by no means anti-Catholic. Her father was a Catholic and so are other close relatives).

REASON FOR GRANTING THE WRIT

What happened in 1966 as a result of Captain Hogan's wrongful abuse of power and outrageous lies to three federal agencies amounts to an American atrocity. Mrs. Rhodes has friends who have urged her

for two years to turn the matter over to investigative reporters for national television. She has preferred instead to present it over and over again to the United States Government through its Courts. She sees nothing fair, or just, or equitable, in a ruling that she knew her cause of action in 1979 in regard to the three libelous documents which were withheld from her until on and after 31 October 1980.

In attempting to present the facts herself (unskillfully), Mrs. Rhodes has not acted entirely by choice. The injustice that had taken place required effort by someone to undo it. She went first to the office of the Equal Employment Opportunity Commission and told of the anti-female bias of the VA doctor, and was told that they could not accept a case that was

more than six months old, and that in 1966 it was not against the law to discriminate against a woman. She has unsuccessfully sought the help of 20 law firms. Most of them said that they were too busy. Number 18 told her honestly, "I can tell by your background that you would not be able to pay what we would have to charge...."

CONCLUSION

Mrs. Rhodes is entitled to the relief sought, and a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

Lina F. Rhodes, Petitioner
(Not an attorney)
1538 Monroe
Memphis, Tennessee 38104
Area Code 901, 272-1387

May 4, 1984

No. 83-5024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
FEB 10 1984

LINA F. RHODES,

Plaintiff-Appellant

v.

RICHARD J. HOGAN, JR.

Defendant-Appellee

JOHN P. HEHMAN,
Clerk

O R D E R

BEFORE: LIVELY, Chief Circuit Judge,
KRUPANSKY, Circuit Judge and PHILLIPS,
Senior Circuit Judge

Upon consideration of the plaintiff's
motion to reconsider this Court's order
affirming the dismissal of her suit,

It is concluded upon another careful
review of her cause that this Court simply
did not overlook or misapprehend any facts
or points of law when it affirmed the dis-
trict court's judgment dismissing the
plaintiff's suit.

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It is, accordingly, ORDERED that the
motion to reconsider be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

(rubber-stamped): NOT RECOMMENDED FOR FULL-
TEXT PUBLICATION etc.

A-2-1

No. 83-5024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINA F. RHODES,)	FILED
)	DEC 12 1983
Plaintiff-Appellant)	JOHN P. HEHMAN
)	CLERK
v.)	
)	<u>O R D E R</u>
RICHARD T. HOGAN, JR.,)	
)	
Defendant-Appellee)	

BEFORE: LIVELY, Chief Judge; KRUPANSKY,
Circuit Judge; and PHILLIPS, Senior Circuit
Judge

This pro se plaintiff appeals from a
district court judgment dismissing her com-
plaint in which she sought monetary damages
from her former supervisor who had allegedly
made libelous and misleading statements about
her in 1966 which caused her to be involun-
tarily retired in that same year as a
civilian employee of the United States Navy.

Although the district court relied on several grounds to dismiss the complaint, we have concluded upon a careful analysis of the district court record and of all the briefs filed by the parties in this cause, to affirm the dismissal of the complaint only on the ground that it was time-barred under the applicable one year state statute of limitations, T.C.A. §28-3-104(a), for bringing libelous actions in Tennessee. See Harvey v. Martin, 714 F. 2d 650 (6th Cir. 1983) (Per Curiam). Plaintiff's cause of action against this particular defendant has not been revived by her discovering new documentation of his alleged libelous actions which occurred in 1966. At the very latest, the plaintiff knew or reasonably should have

known on August 4, 1979, that a cause of action existed against this defendant as she filed on that date a similar action against federal agencies seeking relief based upon the libelous actions of this defendant which allegedly occurred in 1966. This Court ultimately affirmed the dismissal of that complaint on July 8, 1981, for being time-barred and for the plaintiff having failed to exhaust her administrative remedies. See United States v. Kubrick, 444 U.S. 111 (1979); Garrett v. United States, 640 F. 2d 24 (6th Cir. 1981).

For these reasons, this panel unanimously agrees that oral argument is not necessary in this appeal. Rule 34(a), Federal Rules of Appellate Procedure. The

A-2-4

district court's judgment is, accordingly,
affirmed for the aforementioned reasons
pursuant to Rule 9(d)3, Rules of the Sixth
Circuit.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

A-3-1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LINA F. RHODES,

vs.

NO. 081-2894

RICHARD J. HOGAN, JR.

O R D E R

Upon consideration of plaintiff's motion for rehearing, filed on September 17, 1982, and her motion to add comments to motion for rehearing, filed on November 15, 1982, and upon consideration of defendant's motion for the court to enter order on plaintiff's HWW
and plaintiff's motion dated 12-14-82 motion for rehearing, / and her motion to add comments to motion for rehearing are hereby denied. (also her 12-14-82 motion to over-rule defense motions) It is further HWW

ORDERED that the Judgment, entered in this case on September 15, 1982, is a final judgment.

A-3-2

ENTER: This 16th day of December, 1982.

/s/ Harry W. Wellford
HARRY W. WELLFORD
U. S. Circuit Judge
(Sitting by Designation)

A P P R O V E D:

W. HICKMAN EWING, JR.
United States Attorney

By /s/ Joe A. Dycus
Joe A. Dycus
Assistant U. S. Attorney

This document entered on docket sheet in
compliance with Rule 59 and/or 79(a) FRAP
on 12/20/82.

A-4-1

FILED SEP 8
12:50 PM '82
Western Division
Tenn.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LINA F. RHODES,

Plaintiff,

vs.

RICHARD J. HOGAN, JR.,

etc.,

Defendant.

)
)
)
) NO. 81-2894
)
)
)
)

ORDER ON MOTION TO DISMISS

This is a common law action for libel brought against Richard J. Hogan, Jr. for statements he made in 1966 while acting as Captain in the Judge Advocate General's Corps of the United States. Captain Hogan was assigned as the staff legal officer to the Chief of Naval Air Technical Training and was located at the Naval Air Station, Memphis, Tennessee.

Plaintiff was employed as a Secretary and Court Reporter in the Federal Civil Service and was assigned to the Staff Legal Office at

the Naval Air Technical Training Command (NATTC) with Captain Hogan as her Supervisor.

In March, 1966, plaintiff became an outpatient of the Psychiatry and Neurological Service of the Veterans Hospital, Memphis, Tennessee. On July 13, 1966, Captain Hogan submitted a statement covering his assessment of plaintiff's inability to carry out her assigned duties. This statement was forwarded to the United States Civil Service Commission (USCSC) as part of an application for disability retirement that was submitted by the Department of the Navy.

In the July 13, 1966 statement, Captain Hogan said:

1. Mrs. Rhodes has been the subject of prior correspondence. Within the past year, Mrs. Rhodes has most regrettably

totally lost her effectiveness as a Civil Service employee.

2. ... Mrs. Rhodes has now been under psychiatric care to the Psychiatric Department of the Kennedy Memorial Hospital since 24 March 1966.
3. ... Mrs. Rhodes, has, I am quite sure. over the past eleven years been a most efficient civil servant. Her problems seemed to have developed within the last six to seven months. I have attempted in every way to alleviate Mrs. Rhodes' problems by overlooking her constant tardiness and I have condoned her most frequent visits to the Veterans Administration Hospital for treatment. The situation has, however, become intolerable and I have been, as my senior assistant, without the services of Mrs. Rhodes for many weeks.
4. I request that Mrs. Rhodes be referred to the medical department for consultation in connection with evaluation for possible treatment on a medical basis. In any event, it is imperative that the position in this office now held by Mrs. Rhodes be filled with a competent secretary in order to permit the legal division to function with competence.

In August of 1966, plaintiff underwent a psychiatrist fitness-for-duty examination which was conducted by a Navy psychiatrist. The psychiatrist's recommendation, which plaintiff included as Exhibit 8 to her complaint, was also forwarded to the Civil Service Commission as part of the agency's application for disability retirement. The Navy psychiatrist concluded that:

Due to her condition at this time, it is my opinion that she will need frequent medical visits which will prevent her from effectively maintaining a work status.

Pursuant to a release signed by plaintiff on September 20, 1966, medical and psychiatric records at the Veterans Administration (VA) were made available to the USCSC for use in its evaluation of plaintiff's fitness-for duty.

In October, 1966, plaintiff was notified by the USCSC that the agency's application had been reviewed and approved.

Pursuant to the decision of the USCSC, plaintiff was retired for disability effective December 12, 1966.

Defendant has made a motion to dismiss based on: 1) res judicata, 2) the statute of limitations, and 3) official immunity.

RES JUDICATA:

On September 18, 1979, plaintiff filed Cause No. 79-2638-H against the United States Navy, United States Veterans Administration, and the United States Office of Personnel Management and/or United States Civil Service Commission, seeking \$1,000,000. Defendant, Captain Hogan, was not joined in that action. On November 19, 1980, the Honorable Odell Horton dismissed said com-

plaint because of expiration of the applicable statute of limitations and failure to exhaust administrative remedies. On May 5, 1980, Judge Horton denied a motion for reconsideration and therein characterized the cause of action as alleging that "the plaintiff was involuntarily retired in 1966 from her employment by the Navy as a legal secretary and court reporter because of false allegations made against her by a supervisor, a Navy legal officer holding the rank of Captain." Thus, it is clear that plaintiff's former action concerned the identical set of circumstances as are the subject of the instant action. The only variation in the instant case is that plaintiff has sued a different party (Captain Hogan) on a different legal theory (libel).

Under Federal Rule of Civil Procedure 20, defendant Hogan could have been joined in the original action and thus plaintiff, at that time, had a "fair opportunity procedurally, substantively and evidentially to pursue (her) claim the first time."

Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313, 333 (1971). Further, the fact that plaintiff is now alleging a new legal theory does not entitle her to entirely relitigate her cause.

Where two successive suits seek recovery for the same injury, a judgment on the merits operates as a bar to the latter suit, even though a different legal theory of recovery is advanced in the second suit.

Cemer v. Marathon Oil Co., 583 F. 2d 830 (6th Cir. 1978).

Thus, although the doctrine of res judicata will not apply to the instant action

for reason that defendant Hogan was not privy to the first action, Cream Top Creamery v. Dean Milk Co., 383 F. 2d 358 (6th Cir. 1967), defendant does have available the doctrine of collateral estoppel. This is true even though defendant did not participate in the prior judgment, because the same set of circumstances is the subject of the instant action. Blønder-Tongue Laboratories, supra, Corey v. N. Y. Stock Exchange, 493 F. Supp. 51, 56, 57 (W.D. Mich. 1980), and it is clear that the instant theory of the case and the instant defendant could have been advanced and joined in the prior action, see Mayer v. Distel Tool & Machine Co., 556 F. 2d 798 (6th Cir. 1977).

STATUTE OF LIMITATIONS:

The applicable statute of limitations in

this case is Tenn. Code Ann. § 28-3-104, which allows for a one-year period within which to file a cause of action for libel. It is uncontroverted that the defendant's acts in question occurred in 1966, over 15 years prior to the filing of this suit. The plaintiff, nevertheless, contends that she did not obtain access to the specific letters and writings in question until within one year of filing of this suit. It is, however, beyond challenge that plaintiff was aware of her underlying claim at least as early as September 18, 1979, the date on which she first filed suit in based on this same set of circumstances. In her complaint filed in that case, she referred to "Captain Hogan's untrue remarks going into my VA record." Complaint at 2. In specifically referring to one of the documents which

are the subject of the instant complaint she said: "I have tried and tried and still have not received the main document that I want, the complaint of Captain Hogan.... ." In her Reply to Defense Motion to Dismiss Complaint in the original case, she said, on January 15, 1980, that "My fate had already been sealed by Dr. Hogan's untrue remarks, having gone to all three branches of government concerned." Id., at 5. "Captain Hogan obviously made false statements concerning me to the VA during the last week of March, 1966; so it certainly is reasonable to assume that he made additional false statements concerning me in the document he signed in August 1966, to force me into retirement." Id., at 5.

Thus, it is clear that plaintiff was aware of a potential cause of action

against Captain Hogan when she first filed suit in 1979 without joining the same as defendant. She cannot now be heard to claim that she only recently discovered the cause of action because of her recently gained access to the actual documents which she previously had knowledge of. Her claim is, therefore, barred by the statute of limitations.

OFFICIAL IMMUNITY:

Federal officers have absolute immunity from suits alleging mere common law torts based on actions taken within the scope of their responsibilities. Butz v. Economou, 438 U.S. 478, 495, 522 (1978); Barr v. Matteo, 360 U.S. 564 (1959); Granger v. Marex, 583 F. 2d 781, 784 (6th Cir. 1978); Expeditions Unlimited, etc. v. Smithsonian

Institution, 566 F. 2d 289 (D.C.Cir. 1977) (en banc) (Barr, Expeditions and the case at bar are all defamation suits).

From the allegations in the complaint, it is clear that Captain Hogan was the plaintiff's lawfully constituted supervisor to whom had been delegated the responsibility of overseeing the functions and effectiveness of his office staff. In the exercise of his responsibilities to the government, Captain Hogan recommended that the Department of the Navy submit an application for plaintiff's disability retirement because of her medical problems and the resulting impact on her work.

From these facts, it is shown that Captain Hogan was acting entirely within the scope of his authority. Captain Hogan is,

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therefore, vested with immunity with respect to the common law torts which have been alleged. On this basis, the motion to dismiss also is hereby granted.

It is so ORDERED this 8th day of September 1982.

/s/ Harry W. Wellford
HARRY W. WELLFORD, JUDGE
UNITED STATES DISTRICT COURT